



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Approved on:

Minutes of the August 23, 2013, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; Margaret E. Matheson, Esq.; Michael T. Healy, Esq.; Hon. Jane A. Amero

Absent: André G. Duchette, Esq.

Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel

At 1:11 p.m., Chair Walter McKee convened the meeting.

The Commission considered the following item:

Agenda Item #1. Campaign Spending to Influence 2012 Election for Maine House of Representatives, District 1

The Commission met to decide whether to accept a proposed written determination concerning campaign spending to influence the 2012 general election for Maine House of Representatives, District 1. The Commission also considered whether to assess a civil penalty against Representative Michael Nadeau for his acceptance of a contribution in violation of the Maine Clean Election Act (MCEA).

Mr. Woodcock, representing Rep. Nadeau, stated that he reviewed the proposed findings and made some suggestions, some of which have been accepted and some of which have not been accepted but all are before the Commission. He reviewed the suggestions made by the Commission members, all of which he thought were appropriate and helpful and explained the legal context in greater detail, and which would be very helpful in the future for other candidates that participate in the program. He then went on to make a few remarks about the penalty phase and recommended that, if the Commission imposes a penalty, it be very modest and that they should consider mitigating factors. The record established that for Rep. Nadeau and his supporters, with the exception of Phil Soucy, their participation in the election was a first-time experience ~~with running for elected office~~. In many ways, the MCEA is intended to encourage precisely

that kind of participation, and to level the playing field between people who might have access to a lot of resources or might be very experienced political figures and those who might not have access to resources or who might not be very experienced in politics. In this particular election, there were a lot of people who supported Rep. Nadeau who were new to election politics, and Rep. Nadeau himself was new to it as well.

~~For those who have participated in political campaigns,~~ Mr. Woodcock asserted that towards the end of a campaign, particularly in a well-contested election, things usually get confusing, hurried, and hectic. Rep. Nadeau's campaign, he argued, was no exception. Mr. Woodcock went on to say that he and his client were not contesting the findings that the Commission made on July 29th.

~~He reiterated that he believes the evidence shows that the actions at issue in this case occurred in a short period of time.~~ Rep. Nadeau had a lot of options ~~before him~~ as to ~~where how~~ he might ~~put spend~~ his limited ~~money campaign funds, and the options were all considered within the office and as a result a determination was made.~~ One does not know what the words were or exactly know how it came about, but Mr. Majka went out and placed the ad in the ~~paper~~ Fiddlehead Focus.

Mr. Woodcock suggested that this was not anything that people sat down and planned out long in advance. If it happened as the Commission had concluded in its findings that it must have, then it was spur-of-the-moment decision. ~~They He~~ understood that the Commission would need to weigh a number of factors beyond the individual characteristics of the event ~~and consider. They also have to think in terms of what the~~ kind of message they would send. ~~This, Mr. Woodcock stated, was one of the factors that he thought the Commission would want to consider. The MCEA is a voluntary program, and as the Commission looks through consider~~ this particular ~~situation matter~~, it should keep in mind that ~~however it handles it whatever its decision~~, they should set a firm line and yet not discourage people from participating ~~in the MCEA program~~. ~~There should be some understanding within the Commission's determination that they were dealing with amateurs and they would not want to send a message that might discourage others from participating in a program that they all would agree which~~ has very important salutary public purposes. ~~Mr. Woodcock asked the Commission to take those factors into account in reaching a conclusion.~~

Mr. McKee commented that the Commissioners had some procedural matters to resolve. One issue that they need to deal with was the division among the Commissioners in terms of whether the expenditure was made at the direction of Rep. Nadeau or whether the agent, Mr. Majka, had done it, mistakenly or

otherwise, but behalf of the campaign. Mr. McKee commented that they only had four members present and Commissioner Duchette, who he believed voted for the motion, was not present. He was not sure where that left the Commission in that they could not really impose a penalty on both the agent and the candidate because it was really one set of conduct.

Ms. Gardiner commented that she thought the correct way to look at it would be that a majority of the Commission, albeit a different majority on each vote, voted to make all of the legal determinations set forth. The issue before them is what consequences, if any, flow from those legal conclusions. Before the determination is adopted, the Commission could obviously make adjustments, but based on the votes that have been taken, that is where they stand.

Mr. McKee understood there would likely be differing opinions on the appropriate penalty, but he wanted to ensure that the previous decision of the Commission regarding the finding of violation would stand despite the absence of Commissioner Duchette.

Ms. Gardiner said that unless they wanted to reconsider it, the procedure would be for the previous decision to stand.

Mr. McKee said that in re-reading the draft determination, it was not clear to him that the issue of whether Rep. Nadeau directed the agent to place the ad or whether the agent placed the ad on his own was adequately addressed in the findings. ~~Mr. McKee asked Ms. Gardiner if it was her view that while the Commission members may have different views about how it happened, such differing views of the evidence it would be an issue more for determining the penalty as opposed to ensuring that they have adequate findings of fact to support the conclusions of law.~~

Ms. Gardiner stated that there is no harm in sharpening the findings. Staff was making the best effort to write findings that captured what the Commission collectively found, but only the Commission knows what the actual findings were.

Mr. McKee pointed out that a majority had made a finding on ~~it was~~ the issue of whether ~~-the~~ candidate ~~directing~~ the agent to place the ad, ~~which a majority had made a finding on.~~ There is nothing in the

determination, however, that says Rep. Nadeau directed Mr. Majka to place the advertisement. There is a lot of discussion about going to the office, placing the ad, testimony about the ad being paid. The Commissioners discussed whether the circumstantial evidence would support a finding by a preponderance of the evidence that the purchase of the ad was directed by the candidate. Ms. Gardiner stated that it was her sense that the majority of the Commission decided that it was at the last meeting, and it would be appropriate to have that decision reflected in the factual findings more clearly as well as in the legal conclusions.

Mr. McKee then commented that he thought a majority of the Commission made a finding that Rep. Nadeau directed Mr. Majka to place the advertisement knowing that he was prohibited from doing so.

Mr. Healy stated that he had voted against the motion and would continue to do so. That being said, he did not want the majority's finding to be frustrated by not being able to change the report. He would fully cooperate with any amendments that they wanted to make to the findings to support what they voted on. He thought they should do that, but he wanted a notation that he dissented from that conclusion. Ms. Amero stated that she would like that as well.

Ms. Gardiner pointed out that their dissent~~ion~~ from the conclusion was noted on page 12 in the footnote.

Mr. McKee stated that to accurately reflect what happened last time they should say somewhere in the findings that the majority, noting the dissent, determined that based on the evidence, Rep. Nadeau had directed Mr. Majka to place the advertisement knowing that he was prohibited from doing so. It does not change Part D because this violation is in that section.

When asked about other proposed changes, Ms. Matheson said that to the point Mr. McKee was making, on page 149 of the first transcript from January 17th, there was contradictory testimony from Rep. Nadeau in which he said that he created it initially as a possibly an ad, and then he said that he created it to put on the web site. Ms. Matheson noted the draft findings originally said, "His alternative explanation that it was intended for the web site was not well supported," but that was stricken at the suggestion of counsel.

Mr. McKee clarified that he simply wanted the report to reflect what took place at the previous meeting, and he was not asking people to change their minds.

Mr. Healy commented that his proposed changes were reflected in the August 19th draft, and he still would like to see those included.

Ms. Matheson said that in Part D there were suggestions made by Commissioner Healy, and while she understood where he was coming from, they did not take into account the fact that there was case law cited by Commission counsel indicating that they also have to look at the context and the underlying purpose of the law. She did not agree with the insertion, and the conversation she cited regarding it was on page 116 through 120.

Mr. McKee said that they had talked about the underlying purpose of the law and that Ms. Gardiner had brought that up. If they are just adding in something else that talks more about agency law, Mr. McKee asked if that changes anything about what else they would want to add in Part D. Ms. Matheson stated that she was the dissenter because she thought that Mr. Soucy was at least part of the candidate's committee.

Mr. Healy said that he did not disagree with what had been said about the statute, but he did not think it changed anything because agency is not defined, and it had to be defined somewhere. He felt compelled to explain why he would conclude that in one case Mr. Soucy was not an agent and Mr. Majka in the other case was an agent.

~~Mr. McKee commented that if they wanted to add it in to have a complete statement of law that could be done. Ms. Matheson then stated that the tipping point for her was in the motion, and she still did not know if there was a limited agency that was created by operation law or if it is only for the two things that they discussed as the record keeper and the filer.~~

Mr. McKee stated that if there were no other changes, Ms. Matheson could dissent from that portion of the decision unless there was something that she felt strongly should be added, but Ms. Matheson did not think it would change the ruling.

Ms. Gardiner commented that she had cited a Supreme Court case, Faragher v. Boca Raton, in which the Court noted that in interpreting the statute, the common law is a starting point, but not every nuance of agency law should be incorporated into the statute if it is not necessary to effectuate the statute's underlying purposes.

Ms. Matheson asked if they could add it in, and Mr. McKee commented that it could be added at the end of the first full paragraph of D.

Mr. McKee moved to accept the August 19, 2013 draft determination as amended during the meeting and those comments in the draft which were accepted. Ms. Matheson seconded.

Motion passed unanimously (4-0).

Turning to the penalty phase, Mr. McKee stated that the range was \$0 to \$10,000, and he expressed his appreciation for the information that was provided by the staff about prior penalties. Mr. McKee also stated that he appreciated Mr. Woodcock's comments about the hectic nature of the end of a campaign and that a relatively small amount was involved. However, Mr. McKee said he was grappling with what he determined, based on the evidence, to be a direction from the candidate to his agent to place the ad. It was a factual determination. The ad was in Rep. Nadeau's own handwriting. It did not seem accurate to suggest that it was for the web site and somebody went off on his own with it. Mr. McKee said that he was balancing those points. Mr. McKee suggested that they assess a penalty of \$1,000, more significant than some and far less significant than others, in part based on what he saw as intentional conduct, specifically the direction another individual to place the ad.

Mr. McKee moved to assess a penalty of \$1,000. Ms. Matheson seconded.

Mr. Healy did not view the evidence in such a way to conclude that Rep. Nadeau directed or suggested that the ad be placed. He did not see that in the testimony or in the evidence, and one could speculate but he was going on what he heard in the evidence. He had listened to Rep. Nadeau very carefully and found him to be credible, and to come to the conclusion that Rep. Nadeau intentionally told Mr. Majka to put the ad in the newspaper means there would be serious problems with his testimony before the Commission because

his testimony was quite clear. The way that he interpreted it, Mr. Healy said, was that Mr. Majka was deeply involved in the campaign, including creating the web site and Facebook presence. There was no doubt that Rep. Nadeau intended to put an ad in the Fiddlehead Focus. He went there and said so but evidently he found out what the price was and did not have the money left in the campaign to do it. Exhibit 22 was prepared by Rep. Nadeau, as he testified, which was not the final ad but 60% to 80% of the ad. The message was there, and the agent, Mr. Majka, being overly enthusiastic decided on his own that it was better to put it in the paper than to put it on the web site. In Mr. Healy's view, in that circumstance Rep. Nadeau still has a responsibility under the statute. Mr. Majka spent \$420 for the ad, and clearly under 21-A M.R.S.A. §1015(5) that is a contribution which is not permitted for a MCEA candidate. ~~There is not supposed to be a contribution~~, and it was above the limits of what was supposed to have been spent on the campaign. In his mind, the contribution should be returned to the MCEA fund, and some amount of penalty along the lines of what happens when someone makes an excessive contribution to a traditional candidate ought to be the penalty. Mr. Healy stated that if one exceeds the limits in a traditional campaign, usually the campaign refunds the money and a small penalty is assessed.

Ms. Amero said she believed Mr. Nadeau's comments that he had not directed that the ad be placed. Ms. Amero said that she could not support the \$1,000 fine but could support returning the \$420 to the MCEA fund. Mr. McKee asked if it was possible to order such a return, given that the funds never came from the MCEA fund. Ms. Gardiner asked if the Commission believed the distinction between a penalty and a return mattered. She then cited 21-A M.R.S.A. §1127(1) which gives the Commission authority to order the return of funds in addition to fines.

Mr. McKee said that he believed they should be going above and beyond that. To give people the impression that they can go over the cap as long as they give it back is not sending the right message. At Mr. Healy's request, Ms. Gardiner clarified that the Commission has the authority to order a return of funds, but that this was in addition to a fine. Ms. Gardiner suggested the Commission could use the amount spent as a guide to defining what the penalty should be.

Mr. McKee withdrew his earlier motion. Mr. Healy moved to assess a penalty of \$550. Ms. Amero seconded.

Ms. Amero noted that she would not support a higher penalty. Ms. Matheson said she originally believed \$2,000 was an appropriate penalty. Mr. Healy pointed out that if they look at the penalties that have been given, some severe penalties have been given where money has been illegally spent, and this was not something of that nature. It was a contribution in the amount of \$420 that should not have been made. If Mr. Majka did not have the relationship that he did with the candidate and everything that they heard about, he could have gone out and spent \$1,000 on his own and it would not have made a difference. It should not have happened, but it did, and Mr. Healy pointed out these are indeed first-timers in politics. Even people who are experienced in politics get themselves unintentionally into trouble.

Mr. McKee expressed some concern about the lack of a deciding vote. Ms. Matheson asked if the Commission could find some middle ground. Mr. McKee proposed \$750. Ms. Amero did not think the conduct rose to that level of penalty and indicated she had a hard time assessing any penalty.

Mr. McKee stated that if they assumed that Rep. Nadeau did not give the authority and the agent just went ahead and did it, a penalty still has to be imposed for that because otherwise people will just say that it does not matter and go ahead and do it. There has to be some penalty. While penalty will be assessed against Rep. Nadeau, that is consistent with the laws of agency.

Mr. Healy then commented that he had thought that the candidate should reimburse the amount of the contribution and Mr. Majka, who made the expenditure, should be assessed a penalty. He believed this was the proper outcome until learning that notice was not given to Mr. Majka. Ms. Amero stated that she also did not necessarily feel that the candidate was the one who should be fined. Mr. Healy read from 21-A M.R.S.A. §1015(5), "Financing by any person of the dissemination, distribution or republication in whole or in part of any broadcast or any written or other campaign materials prepared by the candidate is considered to be a contribution of that candidate." In this instance, he noted, the candidate certainly made a substantial contribution to the ad. The candidate is responsible for it whether he knows about it or not. He prepared the ad, the ad went out, and the money was spent, Mr. Healy concluded.

Mr. McKee then called for a five-minute recess, after which the meeting was re-convened.

Mr. Healy withdrew his prior motion.

Mr. McKee moved to assess a penalty of \$700. Ms. Amero seconded.

Motion passed unanimously (4-0).

Mr. McKee moved to adjourn and Ms. Matheson seconded the motion, which passed unanimously.

The meeting adjourned.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director